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Reply Brief of Atty. Gen'l for Appellant.

Filed Mar. 3, 1897.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
v.
WONG KIM ARK. } No. 449.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

REPLY BRIEF FOR THE UNITED STATES.

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REPLY BRIEF FOR THE UNITED STATES.

I have just received the advance sheets of the brief of Mr. Maxwell Evarts, of counsel for appellee, and will venture to offer such reply to the views advanced by him as the brief space of time allowed me will permit and the character of the views may require.

II.

No common law of the United States.

In commenting upon the opinion of Vice-Chancellor Sandford in my original brief, I was content to support the statement that "there can be no common law of the

United States" by a mere citation of authorities. But my learned opponent, referring to these, has sought to brush away the whole matter by the declaration that—

> As we read the authorities, which have been cited by the solicitor-general, this court has simply held that there are no common-law offenses against the United States. (*United States* v. *Britton*, 108 U. S., 199–206.)

Of course I do not know *how* my learned friend has read the authorities. Certainly they are not hard to read or difficult to understand. And it is altogether inexplicable how they can be so read as to limit their application to "offenses against the United States." For example: In *Wheaton et al.* v. *Peters et al.* (8 Pet., 657), a case distinguished in the United States for the importance of the question decided, as well as for the eminent character of the parties concerned, this court, speaking through Mr. Justice McLean, said:

> It is clear there can be no common law of the United States. The Federal Government is composed of twenty-four sovereign and independent States, each of which may have its local usages, custom, and common law. There is no principle which pervades the Union and has the authority of law that is not embodied in the Constitution or laws of the Union. The common law could be made a part of our Federal system only by legislative adoption.
>
> When, therefore, a common-law right is asserted, we must look to the State in which the controversy originated.

The learned counsel in referring to the case of *Smith* v. *Alabama* (124 U. S., 465), cited in my original brief, has

been considerate enough to suggest that: "If the counsel for the Government had read this case through he would have found on page 478 the following statement:"

> There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law and are to be read in the light of its history. The code of constitutional and statutory construction which, therefore, is gradually formed by the judgments of this court in the application of the Constitution and the laws and treaties made in pursuance thereof has for its basis so much of the common law as may be implied in the subject and constitutes a common law resting on national authority.

Why the learned counsel supposes that the counsel for the Government had not read the case through, is not disclosed. But it may relieve his mind to be assured that the case was not only read through, but that the paragraph quoted was clearly *seen* through by the counsel for the Government, and was found to contain in its form or spirit nothing at variance with the position maintained, to wit, that there is no common law of the United States. What Mr. Justice Matthews there states was expressed by Mr. Justice Field in *B. and O. R. R.* v. *Baugh* (149 U. S., 394), when he said:

> Indeed, there is no unwritten or general common law of the United States on any subject. (See Tucker's Blackstone, vol. 1, appendix, 422–433.) The common law may control the construction of terms and language used in the Constitution and

statutes of the United States, but creates no separate and independent law for them.

And this court did in *Minor* v. *Happersett* (21 Wall., 167) look to the common law to ascertain from its nomenclature who were meant by "natural-born citizens," and they found just what the Government is contending for here, that "it was never doubted that all children born in a country *of parents who were its citizens* became themselves, upon their birth, citizens also."

And it surely is not to be wondered at that in the numerous cases which counsel has cited from Massachusetts that the great judges of that great Commonwealth should have looked to the common law for the principles by which they were to be guided, because Massachusetts had by express statute incorporated the common law of England into the body of her jurisprudence.

II.

What constitutes citizenship of the United States.

Mr. Evarts has kindly stated for the United States the "two fundamental theories" upon which he has determined their "entire argument stands or falls."

The second of these "fundamental theories" is, "that the question of citizenship in a nation is to be determined by the rules of international law."

We have no doubt that if it were left to the learned counsel to construct the argument for the Government he would be fully able to contrive an opposing argument to overthrow it.

But the position taken in our original brief and adhered to in this is, that citizenship of the United States can not be maintained or ascertained by any reference to the common law of England.

And, again: That Wong Kim Ark, although born in the United States, did not thereby become a citizen thereof, because he was not born subject to their jurisdiction, by which we mean, as this court has held, *altogether, entirely, completely* subject to the jurisdiction of the United States.

It is true, to be sure, that in ascertaining the relation subsisting between Wong Kim Ark, the Chinaman, and the Government of the United States, recourse must be had to the principles of international law, as was done by this court in the Chinese cases in 149 U. S., 724, where, speaking through Mr. Justice Gray, it said:

> Chinese laborers, therefore, like all other aliens residing in the United States for a shorter or a longer time, are entitled, so long as they are permitted by the Government of the United States to remain in the country, to the safeguards of the Constitution and to the protection of the laws in regard to their rights of person and of property, and to their civil and criminal responsibility.

And it may be noticed, further, that the court in that case, as it had done in several previous cases, took notice of those characteristics of the Chinaman which seemed to preclude him from actual citizenship here.

It said, on page 717 of that case:

> After some years' experience under that treaty the Government of the United States was brought to the opinion that the presence within our territory

> of large numbers of Chinese laborers of a distinct race and religion, *remaining strangers in the land, residing apart by themselves, tenaciously adhering to the customs and usages of their own country, unfamiliar with our institutions, and apparently incapable of assimilating with our people, might endanger good order and be injurious to the public interests*, and therefore requested and obtained from China a modification of the treaty.

Mr. Evarts, after referring to this case and to the protection which all Chinese subjects in this country enjoyed under the Fourteenth Amendment (he fails to note, however, that such enjoyment was secured to them by the express terms of the treaty between China and the United States), adds:

> In return for this protection the father of Wong Kim Ark owed *allegiance* to the United States—that is to say, he owed obedience to them, etc.

Obedience is not allegiance. *Li Hung Chang*, during his recent visit to this country owed obedience to her laws, but was in no sense her liege man. He was connected with her by no bond or tie. Every foreign prince, or potentate, is, while residing within the United States, for however short a time, subject in a certain sense to their jurisdiction. He may not, while here, take the lives, property, or liberties of our people. The hand of the law will be laid upon him, at least to the extent of restraining such pernicious activity; and he, in turn, may claim the protection of the same laws to shield him from wrong and injury.

This word *allegiance* has been used improvidently and recklessly by writers and sometimes by judges without intelligent discernment of its appropriate sense.

The dictionaries refer to *acquired allegiance* as that binding the citizen who was born an alien but has been naturalized.

Local allegiance as that which is due from an alien while resident in a country in return for the protection afforded by the Government.

Natural allegiance as that which results from the birth of a person within the territory and under the obedience of the Government. (*Bouvier verb.*)

It is a fact agreed as to Wong Kim Ark "that his father and mother were persons of Chinese descent and *subjects of the Emperor of China*, and that said Wong Kim Ark was and is a laborer." These parents of Wong Kim Ark were temporary sojourners in this land, subject to its jurisdiction only in the sense and to the extent that any other subject of the Emperor of China, crossing the continent in transitu from Europe to Asia, would be, owing to its laws no further obedience and claiming from them no further protection than the rapid-transit tourist might claim; they owed it no allegiance beyond the "local allegiance" above defined.

In *Carlisle* v. *United States* (16 Wall., 148), alien subjects of Great Britain, residing in the State of Alabama during the late civil war, furnished to the Confederate Government saltpeter, under a contract with the superintendent of a niter mining district, to be used for the manufacture of gunpowder for the Confederate army.

In 1864 they were the owners of cotton stored on a plantation in Alabama, which cotton was seized by naval officers of the United States and turned over to an agent of the Treasury Department, by whom it was sold and the proceeds paid into the Treasury. These British subjects sued in the Court of Claims, under the act of Congress, to recover the proceeds of this cotton. The court found that the claimants were the owners of the cotton, and that it had been seized and sold and the proceeds paid into the Treasury. They also found the facts above recited as to claimants' connection with the Confederate Government and dismissed their petition. Mr. Justice Field, in delivering the opinion of the court, said:

> The claimants were resident in the United States prior to the commencement of the rebellion; they were therefore bound to obey all the laws of the country, not immediately relating to citizenship, during their sojourn in it; and they were equally amenable with citizens for any infraction of those laws.

And then, quoting from Wildman's Institutes on International Law, "all strangers are under the protection of the sovereign while they are within his territories and owe a temporary allegiance in return for that protection," the learned justice adds:

> By allegiance is meant the obligation of fidelity and obedience which the individual owes to the government under which he lives, or to his sovereign in return for the protection which he receives. It may be an absolute and permanent obligation, or it may be a qualified and temporary one. *The citizen or subject owes an absolute and permanent allegiance to his*

> *government or sovereign*, or at least until, by some open and distinct act, he renounces it and becomes a citizen or subject of another government or another sovereign. *The alien, while domiciled in the country, owes a local or temporary allegiance, which continues during the period of his residence.*

Mark now. It is the *citizen* who owes an absolute and permanent allegiance as distinguished from the mere sojourner who owes a local and temporary allegiance. To which of these classes does the Constitution refer in the Fourteenth Amendment, when it declares that "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside?"

To which class does it refer as "subject to the jurisdiction thereof?"

We have seen that in a limited and restricted sense *all* persons, whether citizens or aliens, are subject to the jurisdiction of the United States while resident in its territory.

If *all* persons who are born in the United States are in a certain sense subject to its jurisdiction, is it a reasonable or decent construction of the Fourteenth Amendment to hold that the words "subject to the jurisdiction thereof" were used in this restricted sense? If so, why have used the phrase at all when the effect would have been the same without it?

Manifestly citizenship was predicated, not of those who were born in the United States, but only of so many of those thus born as were "subject to the jurisdiction thereof." That, as we have shown in the original brief, it was agreed

by Senators Trumbull, Reverdy Johnson, Howard, and Williams, when this amendment was proposed in the Senate, meant "*fully and completely* subject to the jurisdiction of the United States." Or, as Mr. Justice Field says in the opinion above quoted, "the *citizen* owes an absolute and permanent allegiance," as distinguished from the alien, who owes a local and temporary allegiance.

The learned counsel recognizes the force of this view, and the only *tabula in naufragio* that he can lay hold upon is that the restrictive phrase "subject to the jurisdiction thereof" was intended to refer to the children of foreign ambassadors and the American Indians.

The learned counsel quotes from the Civil Rights Act, section 1992, Revised Statutes:

> All persons born within the United States and not subject to any foreign power, are declared to be citizens of the United States.

And adds:

> We do not see what substantial distinction can be drawn between the words of the civil rights bill and the clause of the Fourteenth Amendment.

And in this I fully concur.

They manifestly intend the same thing. They exclude the absurdity of a "double allegiance."

One who is born within the jurisdiction of the United States means one "not subject to any foreign power." It excludes the notion that one who is the subject of a foreign power can at the same time be a citizen of the United States.

We are not, as the learned counsel suggests, indulging in the refinement of mere subtle speculation, or seeking

to apply as a test some ingenious but impracticable theory. But, on the contrary, we are seeking to ascertain the meaning of this clause in the Fourteenth Amendment by the application of very familiar, plain, and simple rules of construction.

Before and at the time of the adoption of the Fourteenth Amendment a statute of the United States (sec. 1992, Rev. Stat.) defined citizenship. This statute and the constitutional provision, if not repugnant, must be construed together, and the phrases "subject to the jurisdiction thereof" and "not subject to any foreign power" must be taken to express the same thing.

But while this seems to be agreed to by the learned counsel in his brief, yet the argument of the brief is the other way, and seems to contend that the clause "subject to the jurisdiction thereof" was intended to express only what is true of every person who may be in the United States for however short a period.

But if, as insisted, birth alone in the United States made one a citizen thereof, why add the clause "subject to the jurisdiction thereof," unless that clause was intended as a limitation upon the general class of those born in the United States?

If all persons born here are citizens, and all persons who are here at all are subject to the jurisdiction, then it is no limitation; and the framers of the amendment and the legislatures that voted for its adoption are open to the charge of having very solemnly done a very unmeaning act.

Obviously, it meant what the existing statute declares, that only those persons born in the United States "not

subject to any foreign power" became thereby citizens of the United States.

It must then have been used with reference to persons who are *completely* and *entirely* and *absolutely* subject to the jurisdiction of the United States, and not subject to any foreign power.

But Wong Kim Ark's parents were the subjects of a foreign power and were not completely and absolutely subject to the jurisdiction of the United States. Wong Kim Ark, during his infancy, certainly partook of the nationality of his father.

The agreed statement of facts shows that Wong Kim Ark was born in the year 1873, but in what month it does not appear; that his parents returned to China in 1890; that Wong Kim Ark also went to China in 1890, when he could not have been over 17 years of age; that he returned to the United States on the 26th July, 1890, when he could not have been 18 years of age; that after his return, Wong Kim Ark remained in the United States, claiming to be a citizen thereof, until the year 1894, when he again departed for China upon a temporary visit, and with the intention of returning to the United States, and did return thereto in the month of August, 1895.

Now, observe—

In all this agreed statement of facts the only *months* that are mentioned at all are those in which Wong Kim Ark returned to the United States. The month of his birth, and the months of his departure from the United States are nowhere stated.

If he was born in December, 1873, and returned to the United States in the year 1894, at any time before his birthday, he returned as an infant under 21 years of age.

But the statement of facts shows that he returned to the United States in 1890, when he could not have been 18 years of age.

He left the United States and returned to China in the year 1894 "upon a temporary visit and with the intention of returning to the United States, and did return thereto in the month of August, 1895," when the collector of customs refused to allow him to land.

It is not a fact agreed in this case, that Wong Kim Ark was 21 years of age when he departed the United States and returned to China in the year 1894.

It is not a fact agreed in this case, that Wong Kim Ark ever claimed to be a citizen of the United States after reaching the age of 21 years.

Born some time in the year 1873, he became of age some time in the year 1894.

The only act done by him in 1894 was to leave the United States and return to China. If he was then under age, he was obeying the will and following the person of his father. If he was over 21 years of age, he was, in the exercise of his manhood, evincing his purpose to elect China as his home.

Wong Kim Ark now claims to have been from his birth a citizen of the United States. The burden is upon him to make good his claim. The question may turn, in large part, upon the exact date when he reached

the age of 21 years. He alone had the means of proving the exact date of his birth, as he did prove the year of his birth. He, too, could have proved the exact date in 1894 of his departure for China, and could have had these dates among the facts agreed. He can not withhold proofs of actual facts and rely upon presumptions and inferences to establish those facts.

Ludwig Hansding was born in the United States. He went to Europe, and desiring to return to the United States, applied to their minister for a passport, which was refused, "on the ground that the applicant was born of Saxon subjects temporarily in the United States, and was never 'dwelling in the United States,' either at the time of or since his parents' naturalization, and that he was not, therefore, naturalized by force of the statute, section 2172, Revised Statutes."

In this case Frelinghuysen, Secretary of State, to Kasson, minister, said:

> You ask, can one born a foreign subject, but within the United States, make the option after his majority and while still living abroad, to adopt the citizenship of his birthplace? It seems not, and that he must change his allegiance by immigration and legal process of naturalization. Sections 1992 and 1993 of the Revised Statutes clearly show the extent of existing legislation; that the fact of birth under circumstances implying alien subjection, establishes of itself no right of citizenship and that the citizenship of a person so born is to be acquired in some legitimate manner through the operation of statute. No statute contemplates the acquisition of the declared character of an American citizen by a person not at

the time within the jurisdiction of the tribunal of record which confers that character. (2 Wharton's Digest, 399; Snow's Cases of International Law, 222.)

So the questions presented on this branch of the case are, Was Wong Kim Ark, by virtue of his birth alone "in the United States," made subject to the jurisdiction thereof within the meaning of the Fourteenth Amendment? If so, are not all other persons born within the United States in like manner subject to their jurisdiction?

If, then, the fact of birth renders them subject to jurisdiction, what is the significance and what the necessity of the clause "subject to the jurisdiction thereof" in the amendment?

Suppose a son is born to the Emperor and Empress of Germany during a temporary visit to this country, is he born subject to the jurisdiction of the United States and consequently a citizen thereof? If so, suppose he should return to this country when between the age of 18 and 21, would he not be liable in time of war to be drafted as a private soldier in the United States Army?

Ludwig Hausding was in identically the predicament of Wong Kim Ark.

Each was born of nonnaturalized alien parents within the United States.

Each left the United States and returned to his father's country.

Each sought to come again into the United States in the character of citizens thereof, and each was denied by the officers of the Government the right and privilege belonging to that character.

The language employed by Secretary Frelinghuysen in approving the conduct of Minister Kasson is essentially repugnant to the view now urged by counsel for Wong Kim Ark. According to that view, birth alone within the United States is sufficient. But Mr. Frelinghuysen said "that the fact of birth under circumstances implying alien subjection establishes of itself no right of citizenship. What were the circumstances implying alien subjection? None other certainly than the fact that his parents were unnaturalized, were 'Saxon subjects temporarily in the United States.'" But so were Wong Kim Ark's parents. They were not only not naturalized, but under the laws of the United States could not become so.

Hausding may have left the United States intending to return, as did Wong Kim Ark. But while Hausding could have returned and become naturalized here, Wong Kim Ark could not; the law forbade it.

The act of October 1, 1888, declared that from and after its passage it should be unlawful for any Chinese laborer who at any time before had been, or was then, or might thereafter be, a resident within the United States, and who had departed, or might depart therefrom, and should not have returned before its passage, to return to or remain in the United States. And this court has rigorously enforced that statute in *Wan Shing* v. *United States* (140 U. S., 424).

He could not escape on the ground that he was the child of an ambassador or a slave Indian. And yet Mr. Justice Swayne, in *United States* v. *Rhodes* (Ab. U. S.

Reports), to which Mr. Evarts cites us in his brief (p. 34), declares that these are the only two exceptions to the rule.

All such absurd results are avoided only by giving to the clause "subject to the jurisdiction thereof" the meaning which the statesman who framed it declared it was intended to have—that is, subject to the complete, entire, and absolute jurisdiction thereof.

III.

Lynch v. Clark further considered.

In my original brief in this case attention was called to the fact that the case of *Lynch* v. *Clark*, decided by Assistant Vice-Chancellor Sandford, 1 Sand. Ch. Rep., 583, in 1844, has been made the basis of every subsequent decision of this question by the inferior Federal courts, by the Attorneys-General, and by many writers.

Attention was further called to the fact that in the case of *Munro* v. *Merchant* (26 Barb., Sup. Ct. R., decided in January, 1858) a grave doubt was intimated as to the soundness of the views of Chancellor Sandford.

In May, 1860, the case of *Ludlam* v. *Ludlam* was decided by the supreme court of New York. (31 Barb., 486.) In that case Richard L. Ludlam, a native-born citizen of the United States, went to Peru in 1822, and in 1828 married a Chilean woman, resident in Peru. Of this marriage a son, Maximo, was born in Lima in 1831.

In 1837 Richard L. Ludlam returned to the United States, with his wife and children, with the intention of residing here.

The plaintiff in this suit was born in New York in 1837, and brought this action against her father's executors and her brother, Maximo, to compel the executors to pay over to her, to the exclusion of Maximo, the proceeds of the sale of certain real estate in New York, which had descended from Thomas R. Ludlam, a brother of Richard L. Ludlam, to the children of Richard as heirs at law, the contention of the plaintiff being that under the statute of descents of New York aliens could not inherit; that Maximo, her brother, was an alien, by reason of his birth in Peru, and hence could not inherit these lands; and that the proceeds of the sale thereof, so far as applicable to the heirs of Richard L. Ludlam, must be applied to the plaintiff alone, to the exclusion of her brother.

The Supreme Court, reversing the decision of the lower court, held that Richard L. Ludlam was a merchant temporarily residing abroad, intending at some future time, although at a time not defined, to return to the United States; that he was not expatriated, and had never ceased to be a citizen of his native country; that his son, though born in Peru, was a citizen of the United States and entitled to inherit here. The court say (p. 503):

> It may be objected that the country in which such children are born might claim them as citizens by reason of their birth. I apprehend not when the residence of the parents was merely temporary and when the children were removed before their majority.

And, again:

> That as the universal maxim of the common law is *partus sequitur patrem*, it is sufficient for the application of the doctrine just stated that the father should be a subject lawfully and without breach of his allegiance beyond the sea, no matter what may be the condition of the mother.

The "doctrine just stated" being that—

> By the common law, when a subject is traveling or sojourning abroad, either on the public business or on lawful occasion of his own, with the express or implied license of the sovereign, and with the intention of returning, as he continues under the protection of the sovereign power, so he retains the privileges and continues under the obligation of his allegiance, and his children, though born in a foreign country, are not born under foreign allegiance, *and are an exception to the rule which makes the place of birth the test of citizenship.*

The court in this case do, to be sure, cite the case of Lynch against Clarke, but only to call attention to the fact that the learned assistant vice-chancellor reached his remarkable conclusions by a process of reasoning which confounded arguments made by counsel at the bar with opinions delivered from the bench. (See pp. 501–502.) And it may, perhaps, be worthy of note that the opinion of Mr. Justice Swayne in *United States* v. *Rhodes*, relied on by Mr. Evarts, was delivered in 1866, and rests, in large part, upon the opinion of the chancellor in *Lynch* v. *Clarke*. (See 1 Abbott's U. S. Rep., 40.)

If it be true, as held in *Lynch* v. *Clark*, that there is a "national law" of the United States, outside of and

higher than the Constitution and the statutes, under which birth alone in the United States makes one a citizen thereof, why was it that as long ago as April 14, 1802, the Seventh Congress enacted—

> That the children of persons duly naturalized under any of the laws of the United States or who, previous to the passing of any law on that subject by the Government of the United States, may have become citizens of any one of the said States under the laws thereof, being under the age of twenty-one years at the time of their parents being so naturalized or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States, and the children of persons who now are, or have been, citizens of the United States shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States: *Provided*, That the right of citizenship shall not descend to persons whose fathers have never resided within the United States. (2 Stat. L., p. 155, sec. 2172, Rev. Stat.)

If birth alone makes citizenship under Chancellor Sandford's "National Law of the United States," why all the conditions and limitations of this statute? Why this statute at all? Obviously, it can not stand with Chancellor Sandford's national law; one or the other must fall.

Again: On February 10, 1855, Congress enacted (10 Stat., 604)—

> That persons heretofore born or hereafter to be born out of the limits and jurisdiction of the United States whose fathers were or shall be at the time of their birth citizens of the United States shall be deemed and considered and are hereby declared to be citizens of the United States: *Provided, however*, That the

rights of citizenship shall not descend to persons whose fathers never resided in the United States.

That is, that the children of the citizens of this country, born abroad, are themselves citizens of this country; although under Chancellor Sandford's National Law, which is supposed to run with this statute, children of alien parents born in this country lose the nationality of their father and become citizens of the United States. That is, that the maxim *partus sequitur patrem* shall be enforced as to citizens of the United States abroad, but will not be recognized as to alien citizens here.

An intelligent writer on this subject, in the Washington Law Reporter of November 29, 1884, says:

> Generally, no nation considers as aliens the children of its citizens or subjects born abroad; but, on the contrary, they are deemed to be citizens or subjects. Now should the common-law rule prevail in such country, where such children are born, it is evident that there would arise an immediate conflict between the place of birth and the country of the father which might lead to serious consequences. Inasmuch as the country where such persons were born claims as citizens or subjects persons born abroad whose fathers were citizens or subjects at the time of such birth, it should, upon principle, reciprocally recognize the right of a foreign nation to claim as citizens or subjects the children born abroad whose fathers at the time of such birth were citizens or subjects of such foreign nation.

Mr. Evarts, in his brief (p. 56), cites *Dupont* v. *Pepper.* (1 Harper's, ch. 11), where the language used was—

> The character of a natural-born subject, anterior to any of the statutes, was incidental to birth alone.

And he insists that "this part of the decision of the South Carolina court was not reversed by this court when the case was brought here by writ of error under the title of *Shanks* v. *Dupont* (3 Pet., 248).

But it will be seen by reference to the opinion of Justice Story in 3 Peters that the question was controlled by the treaty of peace of 1783, the court holding that Mrs. Shanks, although a native of the State of South Carolina, having married a British subject and voluntarily placed herself under British protection, and adhering to the British side, was deemed by the British Government to retain her allegiance and to be to all intents and purposes a British subject. But she acquired by inheritance title to a moiety of her father's estate in South Carolina while she was a citizen of South Carolina. She did not become an alien until after the death of her father.

So the question presented in this case was not involved in that.

In resorting to cases in which questions of inheritance of property are involved for light to guide us in determining questions of citizenship care must be taken to avoid being misled by confounding two things which have no relation to each other, to wit, the laws of inheritance and the laws of citizenship. They are illustrated by two distinct maxims of the law, *partus sequitur ventrem*, which defines the ownership of property, and *partus sequitur patrem*, which defines their civil status.

Ex parte Reynolds (5 Dill. Cir. Ct. R., 394) arose on a petition for *habeas corpus* for the discharge of James E. Reynolds, committed for murder of Puryer.

The case turned upon the question whether Mrs. Puryer, the wife of the murdered man, was an Indian or a white woman, the court saying:

> Is Puryer an Indian? He is not by blood. Is he by marriage? What is the status of his wife? If she is not an Indian in law, then he is not made a Choctaw by marriage with her; and if not, the question of his residence at the time he was killed cuts no figure in the case. For if he was a white man in law and was killed in the Indian country by Reynolds, although Reynolds may have been an Indian, this court has jurisdiction under the treaty.

The court then passed to the consideration of the legal status of the Choctaw Indians and say (p. 402):

> If the Government of the United States has never recognized them as subject to its jurisdiction, and they have consequently never been treated as citizens, they occupy the same position before the law as though they were citizens of a power entirely independent of us, or were the people who were the citizens of a foreign power. If this be true, when the question arises as to what people a person belongs, what rule is to govern in the solution of the problem? * * *
>
> In the case of the *United States* v. *Sanders* (Hempst., 486), the court held that the quantum of Indian blood in the veins did not determine the condition of the offspring of a union between a white person and an Indian, but further held that the condition of the mother did determine the question. And the court referred to the common law as authority for the position that the condition of the mother fixed the status of the offspring. The court is sustained in the first position by the common law

and also in the last position, if applied to the offspring of a connection between a freeman and a slave, upon the principle handed down from the Roman civil law that the owner of a female animal is entitled to all her brood, according to the maxim, *partus sequitur ventrem*. But by the common law this rule is reversed with regard to the offspring of free persons. Their offspring follows the condition of the father, and the rule *partus sequitur patrem* prevails in determining their status. (1 *Bouvier's Institutes* 198, sec. 502; 31 *Barb.*, 486; 2 *Bouv. Law Dict.*, 147; *Shanks* v. *Dupont*, 3 Pet., 242.)

This is the universal maxim of the common law with regard to freemen—as old as the common law, or even as the Roman civil law, and as well settled as the rule *partus sequitur ventrem*—the one being a rule fixing the status of freemen, the other being a rule defining the ownership of property; the one applicable to different political communities, or states, whose citizens are in the enjoyment of the civil rights possessed by people in a state of freedom, the other defining the condition of offspring which had been tainted by the bondage of the mother.

And this view was subsequently taken by Judge Ross in *United States* v. *Ward*, in the circuit court southern district of California (42 Fed. Rep., 320).

On the whole, we submit that Assistant Vice-Chancellor Sandford's opinion, in *Lynch* v. *Clark*, exhibits more of knowledge than of wisdom; and this display of knowledge has doubtless led estray the judges and Attorneys-General who have relied on that case as the ground of their conclusions.

It is dangerous, in that it seeks to set up an unwritten law in this land higher than the Constitution and of superior authority to the statutes.

It is erroneous in that the whole structure of its argument rests upon the notion of an unwritten "national law" as its corner stone.

It is absurd, logically, in that it holds that title to real property situate within the several States of the Union passes by inheritance, not according to the law of the State where situate, but according to some impalpable, unwritten Federal law.

It confounds the principles upon which rest the rights of property with those which determine the civil status of men.

Its doctrines have been subsequently repudiated by the higher courts of the State in which it was decided, and are inconsistent with the views repeatedly announced by this court.

HOLMES CONRAD,
Solicitor-General.